

## LEGAL REVIEW NOTE

**Bill No.:** HB 481

**LC#:** LC2107 To Legal Review Copy, as of  
January 24, 2017

**Short Title:** Authorize local government to take  
action on wildfires

**Attorney Reviewer:** Todd Everts

**Date:** January 30, 2017

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

### Legal Reviewer Comments:

LC2107, as drafted, allows a county governing body, regardless of whether the county government body has entered into an agreement with a federal agency, to authorize fire protection entities to organize when practicable and when fire danger is immediate and poses an imminent threat to health, safety, or property, to engage in wildfire initial attack on all lands within the county's jurisdictional boundaries, including land under federal ownership.

By statutorily authorizing a county governing body to engage in wildfire initial attack on lands under federal ownership without obtaining the requisite permission from the federal government, LC2107 may raise potential constitutional conformity issues with respect to the Property Clause and the Supremacy Clause of the U.S. Constitution. The Property Clause provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. U.S. Const., Art. IV, sec. 3, cl. 2.

The United States Supreme Court has concluded repeatedly that the federal power under the Property Clause "is without limitations." See *Kleppe v. New Mexico*, 426 U.S. 529, at 539 (1976) and *United States v. San Francisco*, 310 U.S. 16, 29 (1940). The Court has also held "that the Property Clause gives Congress the power over the public lands to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them . . ." *Utah Power & Light Co. v. United States*, 243 U.S. 389, at 405, (1917).

The Supremacy Clause of the U.S. Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. U.S. Const., Art. VI, cl. 2.

The Supremacy Clause provides that if a conflict between state and federal law exists, federal law controls and state law is preempted. The U.S. Supreme Court has held that "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Gade v. National Solid Wastes Mang. Assoc.*, 505 U.S. 88, 108 (1992). In addition, the U.S. Supreme Court has held that states must "enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law . . ." *Printz v. U.S.*, 521 U.S. 898, 913 (1997).

With respect to the interaction of the Property Clause and the Supremacy Clause of the U.S. Constitution as it relates to public lands and the roles of the state and federal government, the United States Supreme Court in *Kleppe* stated:

But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. *Mason Co. v. Tax Comm'n of Washington*, 302 U. S. 186, 197 (1937); *Utah Power & Light Co. v. United States*, 243 U. S., at 403-405; *Ohio v. Thomas*, 173 U.

S. 276, 283 (1899). And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U. S. Const., Art. VI, cl. 2. See *Hunt v. United States*, 278 U. S., at 100; *McKelvey v. United States*, 260 U. S. 353, 359 (1922). As we said in *Camfield v. United States*, 167 U. S., at 526, in response to a somewhat different claim: "A different rule would place the public domain of the United States completely at the mercy of state legislation."

Specifically related to the issue of a state statute authorizing a local government to mitigate fire danger on federal lands without first obtaining permission from the federal government, the United States Court of Appeals for the Tenth Circuit in *United States v. Board of County Commissioners of Otero*, 843 F.3d 1208 (2016), recently held that the Property Clause of the United States Constitution authorizes the federal government to promulgate regulations governing use of the national forest lands, and that under the Constitution's Supremacy Clause and binding precedent, those regulations prevail over any contrary state or local law.

Consequently, LC2107 as drafted may raise potential constitutional conformity issues with the Property Clause and the Supremacy Clause of the U.S. Constitution.

**Requester Comments:**